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Supreme Court of the United States

OCTOBER TERM, 1942

No. 605

CHARLES G. GUTH, on his own behalf and on behalf and for the benefit of all other stockholders of PHOENIX SECURITIES CORPORATION, a corporation,

Petitioner,

against

WALLACE GROVES and W. W. COLPITTS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

ALBERT R. CONNELLY,
Attorney for Respondent Colpitts,
15 Broad Street,
New York, N. Y.

F. W. H. ADAMS,
ABRAHAM N. GELLER,
Attorneys for Respondent Groves,
44 Wall Street,
New York, N. Y.

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Statement of the Case

Petitioner, a resident of Maryland (R. 9), brought this stockholder's derivative suit in the Southern District of New York on behalf of Phoenix Securities Corporation, a Delaware corporation qualified to do business in New York (R. 9, 55), against two New York corporations and several individual defendants. The jurisdiction of the District Court is founded only on the fact that the action

is between citizens of different states (R. 8). Respondent Groves was and is a resident of Connecticut (R. 43-46); respondent Colpitts was and is a resident of New Jersey (R. 49); and neither respondent was or is a resident of the Southern District of New York (R. 43-46, 49).

Upon motions by respondents, pursuant to Section 51 of the Judicial Code (28 U. S. C. § 112), the District Court dismissed the action as against them upon the ground that neither the petitioner, the corporation on whose behalf the suit was brought nor either of the respondents resided in the Southern District of New York (R. 52-54). The Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court, upon the opinion of the District Court (R. 58).

Statute Involved

The relevant portion of Section 51 is as follows:

> "* * * where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; *except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found.*"*

*The italicized portion of the statute was added by amendment in 1936 (49 Stat. 1213).

Respondents' Position

Since jurisdiction is founded only on diversity of citizenship and petitioner is a non-resident of New York, this action, being a "suit by a stockholder on behalf of a corporation", may properly be brought only in a district in which suit might have been brought by the corporation—in other words, in the district of the residence of either the corporation or the other defendants. In the instant case, since respondents are non-residents of the Southern District of New York, the venue of a suit against them in that district is improper unless the corporation on whose behalf the suit is brought is a resident of that district. Phoenix, a Delaware corporation and a resident of Delaware, is not a resident of the Southern District. The Circuit Court of Appeals therefore decided correctly that the venue of this action is improper as to the respondents.

Questions Presented

Although the petition purports to present a single question, the arguments offered in support of it disclose that it really presents two separate questions:

(1) Whether the fact that Phoenix Securities Corporation, a Delaware corporation, has qualified to do business in New York, makes it a resident of New York for purposes of venue and thus establishes the Southern District of New York as a district in which a suit against respondents, non-residents of the district, might have been brought by Phoenix; and

(2) Whether the effect of the 1936 amendment to the Federal venue statute, relating to stockholders' suits, was to eliminate Federal venue requirements in such

suits, and permit suit to be brought in the Federal courts without regard to the residence of the plaintiff, the corporation or the defendant.

Petitioner's "Reasons Relied on for the Allowance of the Writ" (Petition, p. 3), in so far as they include alleged conflict with decisions of other Circuit Courts of Appeals or alleged probable conflict with decisions of this Court, relate solely to the first question. It is submitted that none of such "reasons" is valid and that the decision of the Court below on both questions is in entire accord with the prior decisions of this Court.

ARGUMENT

I

The decision of the Court below that for purposes of venue a corporation is a resident of the state of its domicile does not require review by this Court.

There is certainly nothing novel in the decision of the Court below that a corporation has only one residence, which is the state of its domicile. *Shaw* v. *Quincy Mining Company,* 145 U. S. 444; *In re Keasbey and Mattison Co.,* 160 U. S. 221; *Ladew* v. *Tennessee Copper Company,* 218 U. S. 357; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 363; *Neirbo Co.* v. *Bethlehem Shipbuilding Company, Ltd.,* 308 U. S. 165.

Petitioner asserts, however, that the "modern view" is that a corporation is, for venue purposes, a resident of any state where it regularly conducts business (Brief, p. 20).

Precisely the same argument was addressed to, and rejected by, this Court in the *Neirbo* case.

In the *Neirbo* case, plaintiffs, non-residents of the Southern District of New York, brought suit in that district against Bethlehem Shipbuilding Corporation, Ltd., a Delaware corporation, for an accounting and other relief. Federal jurisdiction was based on diversity of citizenship. The defendant had qualified to do business in the State of New York and, pursuant to what is now Section 210 of the New York General Corporation Law, had designated an agent upon whom process might be served within the State of New York. In answer to defendant's objection of improper venue, plaintiffs urged that defendant had waived the venue privilege or, in the alternative, that defendant had by its conduct become a resident of New York for venue purposes. (See Petitioners' Brief in this Court.) This Court did not adopt the residence argument, pointing out in its opinion that the suit "was not brought 'in the district of the residence of either the plaintiff or the defendant'" (308 U. S., at p. 167), but held that the defendant's qualification to do business in New York and its designation of an agent there for service of process constituted a consent to be sued within the district and a waiver of its venue privilege.

Petitioner, however, disregards the express holding of the *Neirbo* case, and argues that it stands for the proposition that a corporation acquires a residence, for venue purposes, in any state in which it may qualify to do business. Petitioner's argument discloses a complete misconception of the nature of venue requirements and overlooks entirely that venue, as distinguished from jurisdiction, is a privilege, personal to the defendant, which may be waived by the defendant.

As this Court said in the *Neirbo* case (pp. 167-168):

> "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. * * * All the parties may be non-residents of the district where suit is brought. * * * Section 51 'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.' " [Underscoring added.]

The personal privilege aspect of venue has long been recognized, as has the fact that the privilege may be waived by the defendant by a variety of conduct. Illustrations of acts which have been held to constitute a waiver of the privilege may be found in *Gracie* v. *Palmer,* 21 U. S. 697 (voluntary appearance by the defendant); *Commercial Casualty Insurance Company* v. *Consolidated Stone Co.,* 278 U. S. 177 (permitting a judgment by default); and *Lopata* v. *Handler,* 121 F. (2d) 938 (disclaimer of intention to move to remand to the state court).

The *Neirbo* case merely extended the principle of the foregoing cases to establish a different type of conduct on the part of the defendant as constituting a waiver of the privilege.

Both the majority and dissenting opinions in the *Neirbo* case reveal that the Justices were concerned only with the question whether the defendant had waived its venue privilege. The Court understood that it was applying the well-established doctrine of waiver, and did not even suggest

that it was inventing a new theory of secondary corporate residence. In his dissenting opinion, Mr. Justice Roberts stated (p. 176):

> "* * * it has been the law for a century that, as respects the jurisdiction of the federal courts over a corporation in diversity of citizenship cases, the corporation is a citizen and resident of the state of incorporation and of no other state. I do not understand the court's opinion to repudiate the rule."

In *In re Keasbey and Mattison Co., supra,* 160 U. S. 221, the Supreme Court, in upholding a foreign corporation's venue objection, had said (p. 229):

> "* * * it is established by the decisions of this court that, within the meaning of this [venue] act, a corporation cannot be considered a citizen, an inhabitant or a resident of a State in which it has not been incorporated; and, consequently, that a corporation incorporated in a State of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a Circuit Court of the United States held in another State, even if the corporation has a usual place of business in that State.* * *"

In comparing that case with the *Neirbo* case, Mr. Justice Frankfurter, writing the majority opinion in the *Neirbo* case, stated (pp. 173-174):

> "* * * The decisive difference between the present case and *In re Keasbey & Mattison Co.* is that in the latter case the designation under state law which is the basis of consent had in fact not been made.* * *" [Underscoring added.]

That the sole basis of the *Neirbo* case was consent on the part of the defendant—rather than any new concept

of corporate residence—has been consistently recognized in subsequent cases in which the *Neirbo* case was considered. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4; *Graver Tank & Manufacturing Corporation* v. *New England Terminal Co.*, 125 F. (2d) 71 (C. C. A. 1st); *Dehne* v. *Hillman Investment Co.*, 110 F. (2d) 456 (C. C. A. 3rd); *Polito* v. *Molasky*, 123 F. (2d) 258 (C. C. A. 8th); *North Butte Mining Co.* v. *Tripp*, 128 F. (2d) 588 (C. C. A. 9th).

Thus, in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co., supra*, 309 U. S. 4, a suit in the District Court of the Western District of Oklahoma by a non-resident against Wilson & Co., a Delaware corporation, which had, pursuant to the laws of Oklahoma, designated an agent for service of process within Oklahoma, the Court said (p. 7):

> "Both courts below found this [*i.e.*, the designation] to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma upon causes of action arising in that state. The Federal District Court is, we hold, a court of Oklahoma within the scope of that consent, and for the reasons indicated in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, Wilson & Co. was amenable to suit in the Western District of Oklahoma." [Underscoring added.]

Petitioner's suggestion (Brief, p. 20) that if a corporation were "to be denied the right to bring suit in the same district in which it can be sued, there would be a denial of the constitutional right to due process of law" completely misses the point. Under the Federal venue statute, a non-resident of the district can always sue, and be sued by, a resident of the district. Without consent, however, he may not either sue, or be sued by, another non-resident.

The alleged conflict with decisions of other Circuit Courts of Appeals is either non-existent or resolved by the decision of this court in the *Neirbo* case.

In *Overfield* v. *Pennroad Corporation,* 113 F. (2d) 6, the question presented was not the residence of a corporation, but the propriety of serving the corporation in another district under the 1936 amendment to Section 51. Plaintiff, a resident of Utah, instituted a stockholder's action in the Eastern District of Pennsylvania against officers and directors of Pennroad Corporation, a Delaware corporation whose only office was in Delaware, and the Pennsylvania Railroad Company. With one exception, all of the defendants were residents of the district in which the action was brought. The estate of a deceased director, the only non-resident, appeared generally, waiving its objection to the venue.

Pennroad Corporation was served in the district of its domicile in Delaware and appeared specially to move to quash the return of the summons upon it. The Circuit Court of Appeals decided that, under Section 51, as amended, Pennroad Corporation had no proper objection to the venue of the action. The propriety of the service in Delaware upon the Pennroad Corporation was upheld upon that part of the 1936 amendment which provides that, if service is obtained upon defendants in the district of their residence, "process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found." The court said (p. 9):

> "It cannot be disputed that Pennroad, a Delaware corporation, could have maintained a suit in the court below for the same cause of action on the ground of diversity of citizenship. All of the present

> defendants except for Pennroad are citizens and residents of Pennsylvania.* * *" [Underscoring added.]*

The petitioner has cited *Dehne* v. *Hillman Investment Co., supra,* 110 F. (2d) 456, as a further indication that the Third Circuit is committed to the doctrine that a corporation is a resident of the state where it regularly conducts its business (Brief, p. 10). But the *Dehne* case follows the *Neirbo* case. The rationale of the decision is expressed in the following quotation (p. 458):

> "We are of the opinion that by applying for a certificate of authority and designating the Secretary of the Commonwealth as its attorney for process, the appellee waived the provisions of Section 51 of the Judicial Code as amended, 28 U. S. C. A., §112, and must therefore be held to have consented to be sued in the District Court for the Western District of Pennsylvania so long as it had liability outstanding in that State. See Neirbo Company v. Bethlehem Shipbuilding Corporation, Ltd., 60 S. Ct. 153, 84 L. Ed.—."

The *Neirbo* case has resolved whatever apparent conflict might have existed between the decision of the Second Circuit Court of Appeals in the instant case and the decision of the Seventh Circuit in *Dodge Mfg. Co.* v. *Patten,* 60 F. (2d) 676 (1932). The fact that no real conflict has

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*The sentence underscored in the above quotation from the *Overfield* case, which makes it clear that the reason why Pennroad could have sued in the district was not that Pennroad was to be regarded as a resident but that the other defendants admittedly were residents, is omitted in petitioner's reproduction of this part of the opinion (Brief, p. 15).

existed on the basis of the *Patten* case is borne out by a recent decision of a district court in the Seventh Circuit, which is in harmony with this decision of the Second Circuit Court.

Since the *Dodge* decision, this Court in the *Neirbo* case has rejected its reasoning and has reaffirmed the holding in numerous prior Supreme Court cases, which the Seventh Circuit Court of Appeals failed to mention,* that a corporation has its residence in the state of its incorporation and no other state, within the meaning of Section 51. Therefore, the "conflict" has already been resolved by this Court.

The *Dodge* decision on the "residence" question has not been followed in any other circuit since its pronouncement almost eleven years ago, although numerous cases have involved the same question. Recently a district court in the same circuit expressly declined to follow the *Dodge* decision. *Sweet* v. *Hercules Powder Co., Inc.,* 40 Fed. Supp. 356 (E. D. Wis., 1941). The *Sweet* case involved alleged patent infringements and, in the absence of acts of infringement in the district, plaintiff was forced to justify placing the venue in the Eastern District of Wisconsin pursuant to Section 48 of the Judicial Code (28 U. S. C. § 109) by contending that each defendant was an "inhabitant" of that district. Defendants were foreign corpora-

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*The opinion in the *Dodge* case was based upon a decision of Mr. Justice Harlan on circuit in *U. S.* v. *Southern Pacific R.R. Co.,* 49 Fed. 297 (N. D. Cal., 1892), but the Seventh Circuit Court of Appeals failed to note the later contrary decisions of this Court in several of which Mr. Justice Harlan dissented (*Shaw* v. *Quincy Mining Co., supra,* 145 U. S. 444, 453; *Macon Grocery Co.* v. *Atlantic Coast Line R.R. Co.,* 215 U. S. 501, 511. *Cf. Ladew* v. *Tennessee Copper Company, supra,* 218 U. S. 357).

tions which maintained regular places of business in the Eastern District of Wisconsin, and plaintiff relied on the *Dodge* case to support his argument that the defendants were inhabitants of that district. In upholding the defendants' objection to this argument, the District Judge stated (p. 357):

> "* * * Plaintiff points out that the Patten case, supra, was quoted with approval by the Supreme Court in Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, 174, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437. I am of the opinion, however, that the Patten case was approved only to the extent that it held that the venue requirements of Section 51 could be waived by consent, and that the designation by a foreign corporation of an agent to accept process in a State in which the corporation did business constituted such a waiver. Such was the entire rationale of the Neirbo case, which was a diversity of citizenship case under Sec. 51, and involved the question of whether the designation by a foreign corporation of such agent to accept process amounted to a waiver. The court held that it did constitute a waiver, following Ex Parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853."

Because the departure of the *Dodge* decision from the rule established by this Court is so apparent that the decision has not resulted in any confusion in the lower Federal courts, there is no need for this Court again to affirm the obvious proposition already so clearly established by its prior decisions.

Contrary to petitioner's claims, the decision of the Second Circuit in this case is not inconsistent with any of the earlier decisions of that court.

Harr v. *Pioneer Mechanical Corporation,* 65 F. (2d) 332, did not purport to interpret the Federal venue statute. The *Harr* case was a stockholders' action in the Southern District of New York against a Delaware corporation doing business in New York, to enjoin the issuance of preferred stock which was allegedly in violation of plaintiff's rights. It was argued by defendant that plaintiff's complaint was directed toward the internal affairs of the corporation, which should be regulated only by the state of incorporation, viz., Delaware. The Circuit Court of Appeals decided that, inasmuch as the applicable Delaware statute had already been interpreted by the Delaware courts (thereby removing the possibility of conflicting decisions) that Court could exercise as a matter of discretion jurisdiction which it already had as a matter of law. The Second Circuit was not concerned with Section 51 of the Judicial Code. It did not state or decide that the defendant corporation was a resident of a state other than that in which it was incorporated.

Schwarz v. *Artcraft Silk Hosiery Mills, Inc.,* 110 F. (2d) 465, was an action on behalf of a Delaware corporation and was commenced in the Southern District of New York by a resident of that district against the corporation and one of its officers, a resident of Florida. The plaintiff was both a director and a stockholder of the corporation. The defendants moved to dismiss the action on the grounds (1) that personal jurisdiction had not been properly acquired and (2) that the venue was improper. The District Court's dismissal of the action, which was placed solely on the first ground, was reversed. The Circuit Court of Appeals held that the *Schwarz* case was a directors' action under Sections 60 and 61 of the New York

General Corporation Law rather than a stockholders' action within the meaning of the 1936 amendment to Section 51 of the Judicial Code. Accordingly, since the action was an ordinary diversity case and governed by the unamended portion of the venue statute, and not by the 1936 amendment, the residence of the corporation was immaterial and the individual plaintiff's residence within the District satisfied the venue requirements.

II

The 1936 amendment to the Federal venue statute did not eliminate Federal venue requirements.

Petitioner's statement that the purpose of the 1936 amendment "is to exempt a stockholder absolutely from the operation of the residence requirement" (Brief, p. 11) has never been adopted by any court. The Second Circuit's rejection of petitioner's argument, and its decision that the 1936 amendment did not abrogate Federal venue requirements in stockholders' suits, can hardly be classified as novel, or in conflict with the decision of any other court. On the contrary, there would be ample justification for the issuance of the writ of certiorari if, instead of adopting the accepted interpretation of the 1936 amendment, the Second Circuit had adopted petitioner's argument. The intention of Congress is clearly expressed by the language of Section 51. The provision of the 1936 amendment that a stockholders' suit may be brought "in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have

been brought by such corporation" obviously refers to a district which would be proper under the preceding residence requirement of Section 51, *i.e.*, "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant.

The correct interpretation of the 1936 amendment was stated by the Second Circuit Court in *Philipbar* v. *Derby*, 85 F. (2d) 27, as follows (p. 30):

> "* * * [Section 51] allows suit to be brought where the corporation could have brought it and nowhere else. The language is express: 'suit * * * may be brought in any district in which suit * * * might have been brought by such corporation.' The corporation might bring a suit like this, depending on diversity of citizenship, in the district where it resided or where the directors did, and the Eastern District of New York was neither of these in the case at bar. * * *"

See also *Overfield* v. *Pennroad Corporation, supra,* 113 F. (2d) 6, 9.

Petitioner interprets the 1936 amendment to permit suit to be brought (without regard to the residence of any of the parties) in any district in any state in whose courts the corporation could bring suit. The effect of that interpretation would be to substitute the law of a particular state in place of federal venue requirements. As Mr. Justice Roberts stated, in his dissenting opinion in the *Neirbo* case (308 U. S., at p. 179):

> "The state could not, by its laws, affect the jurisdiction of federal courts or the venue of suits therein,—a matter solely within the control of Congress."

And Mr. Justice Frankfurter, writing for the majority, was careful to point out that "In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law" (308 U. S., at p. 175).

Conclusion

A writ of certiorari should not be granted in this case.

Respectfully submitted,

ALBERT R. CONNELLY,
Attorney for Respondent Colpitts,
15 Broad Street,
New York, N. Y.

F. W. H. ADAMS,
ABRAHAM N. GELLER,
Attorneys for Respondent Groves,
44 Wall Street,
New York, N. Y.

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